No. 90-1164

Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1990

WILLIE ALBERT SMITH,

Petitioner,

vs.

LEE ROY BLACK, Commissioner
Mississippi Department of Corrections, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. THE PROSECUTOR'S USE OF PERJURED EYEWITNESS TESTIMONY VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW

Petitioner was convicted and sentenced to die following a trial in which the State of Mississippi proffered two "eyewitnesses" who pointedly identified Petitioner in the courtroom. A unanimous Mississippi Supreme Court held that the "eyewitness" testimony was false:

> [I]t has been clearly established that two of the state's witnesses committed perjury at this trial.

Smith v. State, 492 So. 2d 260, 261

(Miss. 1986). The State of Mississippi nevertheless opposes review by this Court and seeks to execute Petitioner.

The Court below held that it is of no consequence that the State may have acted negligently in offering perjured testimony at trial or that the State now knows that the death sentence rests on perjured testimony. The death sentence may be carried out.

Petitioner submits that this is wrong and violates the due process clause of the Fourteenth Amendment to the United States Constitution. The corruption of the judicial process by the use of perjured testimony has been condemned by this Court for decades. Moreover, in Sanders v. Sullivan, 863 F.2d 218 (2d Cir. 1988), the Second Circuit noted that when the State knows that a death sentence rests on perjured evidence, it

is a violation of basic due process and fairness to nevertheless proceed to carry out that sentence.

The State makes no attempt to defend the fairness of executing a man knowing that his death sentence rests on perjured testimony. Instead, the State argues for the first time that Teague v. Lane, 489 U.S. 288 (1989), bars this Court from correcting the wrong on habeas review.

Because Respondents raised Teague for the first time in this Court, that argument has been waived.[1/] Moreover, Teague does not and should not apply.

This Court's decisions over the years have censured the use of perjured testimony. And under the line of cases beginning with Brady v. Maryland, 373

1/ The State has waived the Teague v. Lane defense on the perjury issue even more clearly than on the aggravating circumstance issue. See Petition for Writ of Certiorari at 62-63.

U.S. 83 (1963), this Court has held that even negligent conduct by the State that has the effect of preventing a fair trial through suppressing evidence is a ground for setting aside a conviction. Barring the negligent use of perjured testimony cannot be considered a new rule of law.

Even if that were not the case, and even if a State were to have greater leeway to affirmatively offer perjured testimony than it has to withhold evidence, Teague would still allow this Court to announce a new rule barring such use of perjured testimony.

This Court recognized in Teague that certain rules should be announced, even on habeas corpus. This Court stated that rules implicating basic procedural fairness are an exception to the normal application of Teague. This Court recognized that the federal courts have

an obligation to deal with a "bedrock procedural element" which is ". . . the kind of absolute prerequisite to fundamental fairness that is 'implicit in the concept of ordered liberty.'" 489 U.S. at 314. This is such a case.

A. Teague Does Not Bar This Court From Correcting A Violation Of Basic Elements Of Fairness: The Execution Of A Man Based Upon Perjured Testimony

The prosecutor should have known that the eyewitness testimony was false; he negligently used that false testimony at trial. (Pet. Br. at 31 et seq.). Moreover, the State now knows that the eyewitness testimony was untrue (Pet. Br. at 18 et seq.), but continues to seek to carry out a death sentence resting on that testimony. The State argues that a rule against executing a man based upon perjured testimony is a "new" rule and under Teague cannot be announced on

habeas.[2/]

There is nothing "new" about the concept that the execution of a man based upon perjured testimony offends due process. As early as Mooney v. Holohan, 294 U.S. 103 (1935), this Court condemned the use of perjured testimony. There is nothing in Mooney that limits itself to knowing as opposed to negligent use of perjured testimony.

Nor is there anything "new" about a rule that negligent conduct by the prosecutor which leads to the corruption of the trial process, requires that a

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2/ Respondents do not argue that Sanders v. Sullivan is incorrectly decided or that the perjury in the present case was not material: they only say that Sanders should not be applied to this case because of Teague. However, Petitioner did not obtain clear evidence that perjury had been committed until 1984, long after his conviction and sentence became final on direct appeal. It would have been impossible for Petitioner to raise any perjury-related issues at trial or on direct appeal -- the now compelling evidence of perjury was unavailable to Petitioner until much later.

verdict be set aside. Beginning with Brady and ending in United States v. Agurs, 427 U.S. 97 (1976), this Court established basic procedural safeguards to protect the fairness of trials. Under those cases, negligent conduct that leads to the mere withholding of material evidence can lead to setting aside a verdict.

It thus cannot be a "new" holding that negligent conduct in offering perjured testimony which affirmatively corrupts the judicial process is reason to set aside a verdict. Indeed, Agurs explicitly states that the Brady/Agurs doctrine encompasses, inter alia, perjury. 427 U.S. at 103-04.

B. Petitioner's Claim Implicates Bedrock Procedural Elements Which Make Teague Inapplicable

But even if this concept was "new", this Court must have the ability under Teague to correct the error, to hold that

the State may not negligently offer perjured testimony and then -- after discovering that perjury -- proceed to carry out the death sentence. As this Court held in Teague: a new rule should be applied retroactively if it "will properly alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction." 489 U.S. at 311 (quoting Mackey v. United States, 401 U.S. 667 (1971)) (emphasis in original).

Indeed, Teague cited perjured testimony as the type of wrong that justifies the application of a new rule:

> Finally, we believe that Justice Harlan's concerns about the difficulty in identifying both the existence and the value of accuracy-enhancing procedural rules can be addressed by limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is seriously diminished.
>
> * * *

> Because we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge. We are also of the view that such rules are "best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus. . . . that the prosecutor knowingly made use of perjured testimony . . ."

489 U.S. at 313-14 (citation omitted) (emphasis added).

There can be few, if any, more fundamental elements to a trial under the rule of law than the proscription against perjured testimony. And cases as far back as Mooney and continuing through Brady hold that the procedural integrity of trials is basic to our concept of fundamental fairness.[3/]

[3/] As the Teague Court noted, a jury verdict in violation of the Batson rule "does not undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction." 489 U.S. at 315. This may not be said of a jury which returns a verdict based on materially false testimony.

In Mesarosh v. United States, 352 U.S. 1 (1956), a federal case on direct appeal, this Court clearly expressed its position regarding the use of perjured testimony in its own courts:

> The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial. . . . The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them.

Id. at 9, 15.

Habeas proceedings are the classic arena for assessing whether a defendant's rights have been violated through the unconstitutional use of perjured testimony.[4/] Teague should not deprive this Court of the ability to announce a rule that most Americans undoubtedly

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[4/] Mooney, Sanders, and all the cases cited in the Respondents' Brief at 15-16 were decided on habeas review.

already believe is basic to due process of law: a man may not be put to death based on perjured eyewitness testimony.

C. The Mississippi Supreme Court's Ruling That The Eyewitness Testimony Was False Is Fully Supported By The Record; Counsel For Respondents May Not Ask This Court To Find That The Mississippi Supreme Court's Unanimous Finding Of Fact Was Unfounded

Counsel for Mississippi makes an additional and surprising argument, attacking as unfounded a unanimous finding of fact by the Mississippi Supreme Court. Counsel for Respondents argues to this Court that there was no perjury, and "no credible recantations" by the two supposed eyewitnesses who testified at trial. Resp. Br. at 18. This argument flies in the face of the Mississippi Supreme Court's unanimous holding that both eyewitnesses had perjured themselves at Petitioner's trial:

> [I]t has been clearly established that two of the state's witnesses committed perjury at this trial.

Smith, 492 So. 2d at 261.

The Mississippi Supreme Court's ruling on the "question of perjury" -- a pure issue of fact -- is entitled to the utmost deference. Sumner v. Mata, 449 U.S. 539, 546-547 (1981). See also Burden v. Zant, ___ U.S. ___, 111 S. Ct. 862, 864 (1991) (a determination of fact by a state court shall be presumed correct for purposes of a federal habeas corpus proceeding).

Mississippi's highest court made its factual finding after review of a record that included a full day of hearings at which thirteen witnesses testified at length. That record included a number of material documents -- produced for the first time at the hearing -- that the State had previously withheld from

Petitioner and his counsel.[5/] The

[5/] Counsel suggests that the Mississippi Supreme Court's finding of perjury is unfounded because it was based on the eyewitnesses' "failure to recant their recantations." (Resp. Br. at 22). That is not true. First, it was based on far more, as shown above. Second, the record of the hearing reflects that Messrs. Thomas and Wells, the two eyewitnesses, stood their ground despite extreme efforts by Special Assistant Attorney General Boyd to convince Mr. Thomas to "recant his recantation" (Record on Appeal of Petition for Writ of Error Coram Nobis ("CN") at 335), and to "advise" of the "problems that could result . . . [from] giving any type of false or perjurious affidavits or statements in the matter." (CN at 339, 357). Wells, for example, insisted that the statement given to the police and in court was "made up." (CN at 339).

At the hearing before the Circuit Court, the State supplied the ultimate pressure, threatening to prosecute the two eyewitnesses for perjury if they recanted their trial testimony. (CN at 9). In light of these threats, and upon advice of court-appointed counsel, both witnesses claimed their Fifth Amendment right against self-incrimination and declined to testify at the hearing. (CN at 76-84). However, as Mr. Boyd testified at length on cross-examination at the hearing, neither witness "recanted his recantation." (CN at 344, 357). The evidence of trial perjury admitted at the hearing included not only the affidavits of Thomas and Wells, but also lengthy sworn statements on tape recordings. (CN at 120, 124-143, 159-187, 189).

Mississippi Supreme Court's unanimous finding, based on a full record, cannot be questioned; and certainly not by the State's own lawyers.

II. THE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" ISSUE IS NOT PROCEDURALLY BARRED AND REQUIRES THAT CERTIORARI BE GRANTED

The Mississippi Supreme Court, performing its statutory duty on direct appeal to review the aggravating circumstances, affirmed an invalid "especially heinous, atrocious or cruel" aggravating factor. It affirmed Petitioner's conviction and sentence without either re-weighing the aggravating and mitigating evidence or conducting a harmless error review. See Smith v. State, 419 So. 2d 563, 574 (Miss. 1982), cert. denied, 460 U.S. 1047 (1983).

Petitioner argued to the Fifth Circuit that Clemons v. Mississippi, ___ U.S. ___, 110 S. Ct. 1441 (1990),

required that this case be remanded to the Mississippi Supreme Court for re-weighing, harmless error analysis or further remand to the trial court for a new sentencing hearing. See Pet. Br. at 39 et seq. The Fifth Circuit held that such relief would require application of a recent opinion of this Court (Clemons) and was therefore barred by Teague. See Smith v. Black, 904 F.2d 950, 980-87 (5th Cir. 1990). (A128-59).

On January 22, 1991, the very day Petitioner filed his Petition, this Court decided Parker v. Dugger, ___ U.S. ___, 111 S. Ct. 731 (1991).[6/] Parker applied Clemons v. Mississippi to a case similar in its facts to the present case and remanded to the Florida Court for further

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[6/] Parker v. Dugger was therefore not discussed in Petitioner's brief. Parker was decided six months after the Fifth Circuit's opinion in this case.

proceedings. Parker shows that this case should be remanded to the Mississippi Supreme Court.

A. Parker v. Dugger Establishes Petitioner's Right To Review

In Parker v. Dugger, this Court applied Clemons *retroactively* to a very similar case:

> After striking two aggravating circumstances, the Florida Supreme Court affirmed Parker's death sentence without considering the mitigating circumstances. This affirmance was invalid because it deprived Parker of the individualized treatment to which he is entitled under the Constitution. See Clemons, supra, 494 U.S., at __.

Parker, ___ U.S. at ___, 111 S. Ct. at 740 (emphasis added).

The pertinent citation from Clemons reads as follows:

> An automatic rule of affirmance in a weighing state would be invalid under Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982), for it would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances.

Clemons, ___ U.S. at ___, 110 S. Ct. at 1450 (emphasis added).

Parker and Smith cannot meaningfully be distinguished. Both were final on direct appeal prior to this Court's decision in Clemons, but after Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982). In both Parker and Smith, the jury found an invalid aggravating circumstance and, although each case involved a "weighing" state, in each case the state's highest court failed to either re-weigh the evidence or conduct a harmless error analysis. In each case, the petitioner was deprived of the right to the individualized treatment that would result from a full consideration of the mitigating factors present in his case, after aggra-

vating factors had been held invalid.[7/]

Petitioner is entitled to the same relief this Court granted to Robert Parker. See Teague, 489 U.S. at 349, 351 ("Retroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, even-handed justice requires that it be applied retroactively to all who are similarly situated. . . . [S]elective application of new rules violates the principle of treating similarly situated defendants the same").

Respondent concedes that Parker applies. See Resp. Br. at 48. But, in an effort to avoid Parker, Respondent notes what is clear from the opinion itself:

[7/] In Petitioner's case, there has not yet been a finding that the use of the "especially heinous, atrocious or cruel" jury charge was invalid. However, there is also no longer any serious dispute about this issue. See Maynard v. Cartwright, 486 U.S. 356 (1988).

Parker did not explicitly discuss Teague.

Finally, whether Parker explicitly discusses Teague is of no moment: even-handed justice requires that all who are similarly situated be treated the same. Mr. Smith, just as much as Mr. Parker, is entitled to individualized consideration before he can be sentenced to death.

B. Petitioner Is Not Procedurally Barred

Finally, the State incorrectly argues that the Mississippi Supreme Court has already found Petitioner's claim to be procedurally barred, citing Smith v. State, 434 So. 2d 212, 218 (Miss. 1983). Resp. Br. at 28. When Petitioner's appeal became final in 1983, Mississippi did not strictly or regularly follow a procedural bar rule.[8/] Wheat v. Thigpen, 793 F.2d

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[8/] This argument and others were presented to the Fifth Circuit, which did not reach the issue. Smith, 904 F.2d at 987 n.18. (A163).

621, 625-27 (5th Cir. 1986) (citing the very same Smith opinion on which the State relies); see Reddix v. Thigpen, 805 F.2d 506, 512 (5th Cir. 1986) (applying Wheat). The procedural bar rule later followed by the Mississippi Supreme Court thus does not apply here.

CONCLUSION

For all the additional reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

The undersigned, being duly sworn, on oath deposes and says:

That affiant is a citizen of the United States; that affiant is now and at times mentioned was of legal age, not a party to the above-entitled action and competent to be a witness herein.

That on the 16th day of April, 1991, this affiant duly served by first class mail, postage prepaid, three true and correct copies of Willie Albert Smith's Reply to Brief in Opposition to Petition for Writ of Certiorari to the United States

Court of Appeals for the Fifth Circuit,

addressed to:

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Sworn to before me this
16th day of April, 1991

Notary Public

MARK T. MILLKEY
NOTARY PUBLIC, State of New York
No. 31-4970839
Qualified in New York County
Certificate filed in New York County
Commission Expires : August 20, 1992